Petition

81-305

No.

Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1981

KEITH BRINK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Filed August 7, 1981

QUESTIONS PRESENTED

1. Does active participation in unlawful use of the Grand Jury by a prosecutor and an I.R.S. agent deprive a defendant of due process of law under United States v. Payner, 65 L. Ed.2d 468 (1980) and Rochin v. California, 342 U.S. 165 (1952)?

2. Does institutional commitment by the prosecution to charge by information rather than Grand Jury indictment preclude a prosecutor, under the doctrine of separation of powers and United States v. LaSalle National Bank, 437 U.S. 298 (1978), from continued use of the Grand Jury subpoena?

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OPINION BELOW

Petitioner was found guilty by a jury in the U.S. District Court and sentenced to an aggregate term of imprisonment of two years, with a total fine of $10,000 imposed. On a direct appeal to the U.S. Court of Appeals for the Eighth Circuit, petitioner's conviction was affirmed in an opinion published at 648 F.2d 1140 (1981). The Court of Appeals denied on June 8, 1981 petitioner's Motion for Rehearing or, in the Alternative, Motion for Rehearing En Banc. Petitioner's Motion for Stay of Execution Pending Application for Certiorari to this Court was denied on June 29, 1981.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1981. A timely Motion for Rehearing, or in the Alternative, Motion for Rehearing En Banc was denied

by the Court of Appeals on June 8, 1981 and this Petition is timely filed within sixty days after the Court of Appeals' Order of June 8, 1981. Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does active participation in unlawful use of the Grand Jury by a prosecutor and an I.R.S. agent deprive a defendant of due process of law under United States v. Payner, 65 L. Ed.2d 468 (1980) and Rochin v. California, 342 U.S. 165 (1952)?

2. Does institutional commitment by the prosecution to charge by information rather than Grand Jury indictment preclude a prosecutor, under the doctrine of separation of powers and United States v. LaSalle National Bank, 437 U.S. 298 (1978), from continued use of the Grand Jury subpoena?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner was convicted of two counts of failure to file a tax return and two counts of filing of a false or fraudulent withholding statement (Form W-4) on the basis of original forms W-4 and other documents introduced at his jury trial over petitioner's objection. The documents were secured by Grand Jury subpoenas after the prosecutor stated unequivocally to the court that the charge would be by information rather than by indictment. This Petition draws into question Grand Jury abuse and prosecutorial misconduct in light of United States v. Payner,

65 L. Ed.2d 468 (1980) and Rochin v. California, 342 U.S. 165 (1952), and separation of powers, in light of United States v. LaSalle National Bank, 437 U.S. 298 (1978).

On direct appeal from the trial court to the U.S. Court of Appeals for the Eighth Circuit, the appellate court found that there was no Grand Jury abuse. The conviction was affirmed on the theory that the prosecutor had stated to the court that he "might" proceed by information, 648 F.2d 1142, and that the documents secured by the Grand Jury subpoenas were returned to their employers after review by the handwriting expert and were later secured prior to trial by trial subpoena. The court also concluded that use at trial of the subject documents was not prejudicial. Doctrine of separation of powers was not addressed.

Because the opinion of the Court of Appeals for the Eighth Circuit chose to seriously misread the facts of record, we set them out below.

CIRCUMSTANCES OF GRAND JURY ABUSE, PROSECUTORIAL MISCONDUCT, AND ENCROACHMENT OF POWERS

On March 12, 1980, petitioner was subpoenaed by the Grand Jury to testify, which he did, but was denied his request to present evidence. Petitioner at that time refused to submit handwriting exemplars. Petitioner was subpoenaed before the Grand Jury to testify on March 21, 1980, but when he appeared, he was told by Assistant U.S. Attorney Helfers that the Grand Jury was not in session, whereupon Helfers handed to petitioner an order to appear that same day before the District Court with regard to a hearing to compel petitioner to submit before the Grand Jury handwriting exemplars.

At the hearing, which was held on March 26, 1980, the court ordered petitioner to submit handwriting exemplars notwithstanding the unequivocal statement by Helfers: "Judge, the matters in this case are all misdemeanors, so the Government intends to file an information." (Emphasis added.) In answer to the court's question, "In other words, it will not be an indictment? If you proceed, it will be a misdemeanor?" Helfers replied, "Yes, Your Honor, that's correct." (App. 1).

Then on April 7, 1980, Helfers, with the assistance of I.R.S. Special Agent Brooks, issued Grand Jury subpoenas to various employers of petitioner requesting original documents, which documents included original Forms W-4 and W-2 for which defendant was subsequently charged.

Brooks indicated by letters to other

I.R.S. agents serving the subpoenas that "Due to the probability that handwriting examination and comparison will be needed, it is requested that the subpoena be issued as soon as possible". (Court's Exhibit 1). During the period April 8 through April 22, 1980, Grand Jury subpoenas were served upon various employers of defendant and documents were received by the prosecution. (There is no evidence of record to date as to whether or not the documents were, in fact, turned over to the Grand Jury, or retained by Brooks.)

Helfers signed and filed the information on April 23, 1980, the same day upon which one of the employers was served with a Grand Jury subpoena and delivered documents to the Government. (Court's Exhibit 1). On June 30, 1980, original documents secured by the subpoenas were forwarded by the I.R.S. to a handwriting

expert in Chicago for analysis. (RT 238-240). (See "Time Line and Document Flow, App. 3.)

Although petitioner suspected Grand Jury abuse and filed pretrial motions for inspection of Grand Jury minutes, to dismiss due to Grand Jury abuse, and for failure of Grand Jury to indict, which motions were denied, it wasn't until after commencement of the trial that petitioner discovered, by accident, documents in the hands of the prosecution, Court's Exhibit 1, evidencing use of the Grand Jury subpoena after Helfers' statement to the court that the charge would be by information. Defendant thereupon moved for dismissal, or in the alternative, for evidentiary hearing regarding Grand Jury abuse, both of which motions were denied by the trial court. (RT 162-167 and 227-233).

Because the record is unclear as to whether Brooks returned to the owners the original subpoeaned documents prior to trial, petitioner filed a motion to supplement the record with affidavit of a key trial witness, which motion was denied. Petitioner argued that the Grand Jury was not even in session after March 26, 1981, that the original documents secured by the Grand Jury subpoenas were retained by Brooks for use by the handwriting expert and for subsequent admission at trial, and that trial witnesses merely carried copies of the documents to trial pursuant to trial subpoena.

At oral argument, Chief Justice Lay of the Eighth Circuit asked of the prosecutor "At the same time he [Helfers] told the Judge that he was going to use the hand-writing exemplars to aid the Grand Jury. Isn't that a direct misrepresentation?"

To which the prosecutor replied, "Yes, Your Honor." Justice Lay thereupon stated:

> It seems to me the most important thing is whether there is an abuse of the Grand Jury proceeding; and the day the U.S. Attorney stands before the Judge and says "Your Honor, we are going to proceed by an information," that is a direct representation to the Judge. That was done on March 26. Nonetheless, thereafter the U.S. Attorney used the Grand Jury to collect evidence with no intention of ever presenting to the Grand Jury the evidence.
>
> (Court's tape recording of oral argument.)

REASONS FOR GRANTING THE WRIT

I.

THE UNLAWFUL USE OF THE GRAND JURY WAS SO OUTRAGEOUS AS TO DENY THE ACCUSED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT.

Petitioner's conviction was upheld by the U.S. Court of Appeals for the Eighth Circuit. Petitioner contended

that the prosecutor and I.R.S. Agent assisting the prosecutor abused the Grand Jury process to such an extent as to require reversal, or in the alternative, evidentiary hearing regarding prosecutorial activities before the Grand Jury subsequent to the prosecutor's express statement of intent to charge by information. Petitioner relied upon those cases of illegal conduct by federal agents, such as Rochin v. California, 342 U.S. 165 (1952), McNabb v. U.S., 318 U.S. 322 (1943) and Jackson v. Denno, 378 U.S. 368 (1964), together with cases regarding Grand Jury abuse and prosecutorial misconduct, discussed infra. In rejecting this contention, the Court of Appeals reasoned that the Government "could have" obtained the documents by way of a Rule 6(e) motion or Rule 17(c) motion.

Despite Chief Justice Lay's inquiry and comments discussed supra, the court held there was no Grand Jury abuse nor prosecutorial misconduct, stating that "by inadvertence or mistake, the documents were retained and disclosed without express authorization from the District Court." 648 F.2d 1142. And Justice Henley, writing the opinion, interpreted Helfers' express statement of intent to mean "might." Finally, the court found the error, if any, to be non-prejudicial.

In U.S. v. Payner, 65 L. Ed.2d 468 (1980) this court stated, at 476, footnote 7, that: "The supervisory power merely permits federal courts to supervise 'the administration of justice' among the parties before the bar. [Citing McNabb, supra.]" In Payner, it was the I.R.S., by and through their special agents, that conducted an illegal

search and seizure. The I.R.S. agents and their accomplices were not before the bar, unlike the instant case.

In Jackson v. Denno, 378 U.S. 368 (1964), this court pointed out that the police must obey the law while enforcing the law; that in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. This court has repeatedly held that United States prosecutors must comply with the requirements of due process of law when seeking to prosecute criminals. Rochin, supra. In Payner, supra, at 477, footnote 9, this court noted, citing Rochin, that the "'Limitations of the due process clause . . . come into play only when the Government activity in question violates some protected right of the defendant."

Petitioner admits total failure in his search to find even a single case which would authorize the prosecution to utilize the Grand Jury for purpose of assisting the prosecutor in bringing the charges by information. "The Grand Jury earned its place in the Bill of Rights by its shield, not by its sword." United States v. Cox, 342 F.2d 167 (5th Cir. 1965). In Hale v. Henkel, 201 U.S. 43 (1906), this court noted that Grand Jurors are not appointed for the prosecutor or for the court, but are appointed for the Government and the people. The Grand Jury is not a mere tool of the prosecutor; it is an integral part of the judicial arm of government. In re Grand Jury Subpoena, 225 F. Supp. 923 (N.D. Ill. 1964). For the ancient role of the Grand Jury, aside from finding probable cause, is to protect citizens

from unfounded criminal prosecutions. Branzberg v. Hayes, 408 U.S. 665, 686 (1972).

Although an Assistant U.S. Attorney is vested with broad discretion to protect the public from crime, his powers are limited by applicable provisions of federal statutes. He is charged with the duty of seeing that the accused receives a fair trial, Calo v. United States, 338 F.2d 793 (1st Cir. 1964), and he can use only legitimate means to bring about a conviction, Rea v. United States, 350 U.S. 214 (1956) (federal agent obligated to obey the Rules); Berger v. United States, 295 U.S. 78 (1935) (conviction reversed due to improper prejudicial conduct of prosecutor); United States v. Graham, 325 F.2d 922 (6th Cir. 1969) (conviction vacated and new trial ordered due to improper closing argument by prosecutor).

Petitioner further urges that the prosecutor abused the Grand Jury by requiring the appellant to appear by subpoena at a time in which the Grand Jury was not even in session. Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954); In re Melvin, 546 F.2d 1 (1st Cir. 1976); United States v. Fisher, 455 F.2d 1101 (2nd Cir. 1972); U.S. v. Thomas, 320 F. Supp. 527 (D.C. 1970).

And, as Chief Justice Lay so succinctly noted at oral argument, the Assistant U.S. Attorney "used the Grand Jury to collect evidence with no intention of ever presenting to the Grand Jury the evidence." (Court's tape recording of oral argument.)

II.

USE OF THE GRAND JURY SUBPOENA AFTER GOVERNMENTAL COMMITMENT TO CHARGE BY INFORMATION PERMITS A PROSECUTOR TO ENCROACH UPON POWERS CONFIDED TO THE JUDICIARY.

In United States v. LaSalle National Bank, 437 U.S. 298 (1978) this court

examined the limits of the good faith use of an I.R.S. summons, and held that the line of demarcation between civil and criminal purposes is the point at which the I.R.S. recommends to the Department of Justice criminal prosecution. It was noted in the opinion that there was no suggestion from Congress that I.R.S. summons powers "broadened the Justice Department's right of criminal litigation discovery or to infringe on the role of the Grand Jury as a principal tool of criminal accusation." 437 U.S. 233. As a part of the "good faith" requirement, the LaSalle court required, at 236, that the I.R.S. "not abandon in an institutional sense, pursuit of civil tax determination or collection." The case at bar presents somewhat of a converse to LaSalle: the point of demarcation from which a prosecutor can no

longer utilize the Grand Jury subpoena is, petitioner urges, the point at which the Government unequivocally abandons the Grand Jury indictment for charge by information. This case presents another form "of agency abuse of congressional authority and judicial process" foreseen by the LaSalle court at 236, footnote 20. And petitioner submits that this is a case of not only institutional bad faith, but also of personal bad faith on part of the prosecutor and his assistant, the I.R.S. Special Agent. U.S. v. Dahlstrum, 493 F. Supp. 966 (D.C. Cal. 1980)(conviction reversed due to institutional and personal bad faith).

Grand Jury investigations cannot be utilized for the sole or dominating reason of collecting evidence to be used at the trial of a pending indictment, much less a pending information. It is improper

for the Government to use the Grand Jury for either strengthening its case or as a substitute for discovery. United States v. Gibbons, 605 F.2d 1320 (10th Cir. 1979). See also, Silverthorn Lumber Company v. United States, 251 U.S. 385 (1920), in which a search and seizure was made without any authority from a Magistrate. In the instant case, if there was no valid Grand Jury in session during issuance of the subject subpoenas, the search and seizure was made without authority.

And, in the case of In re National Window Glass Workers, 287 F. 219 (N.D. Oh. 1922), subpoenas were vacated and set aside because of prosecutorial misconduct and Grand Jury abuse. A Grand Jury subpoena must be shown to be relevant to an investigation, properly within the Grand Jury's jurisdiction and not sought primarily for another purpose. In re

Grand Jury Proceedings, 507 F.2d 963 (3rd Cir. 1975). For other cases dealing with misuse of the Grand Jury, see Beverly v. United States, 468 F.2d 732, 734 (5th Cir. 1972; United States v. George, 444 F.2d 310, 314 (6th Cir. 1971); Robert Hawthorne Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1130 (D.C. Pa. 1976).

The U.S. Supreme Court has stated that the Grand Jury process is abused if the powers of the Grand Jury, such as the power to subpoena documents, is used to gather evidence for civil enforcement rather than for the purpose of criminal investigation. United States v. Proctor & Gamble, 356 U.S. 677 (1958). And, the most valuable function of the Grand Jury is to stand between the prosecutor and the accused. Hoffman v. United States, 341 U.S. 479 (1951).

Lastly, this line of demarcation between

Grand Jury indictment and information presents a constitutional problem of separation of powers. Because the Grand Jury is an integral part of the judicial arm of government, In re Grand Jury to Central States, 225 F. Supp. 923 (N.D. Ill. 1961), a federal prosecutor when assisting a Grand Jury wears the colors of the judicial branch of government rather than those of the executive. But in bringing charges by information rather than by indictment, he accuses on behalf of the executive branch. It follows then that he cannot liberally hopscotch between the two branches of government with regard to a single case. If the courts are to deter illegal conduct by governmental officials and protect the integrity of the federal courts, McNabb, supra, then this line of demarcation must be well-defined as in the LaSalle case.

This court has held that the doctrine of separation of powers protects the liberties of the people from excessive concentration of power within one branch of government. United Public Workers v. Mitchell, 330 U.S. 75 (1947); O'Donoghue v. United States, 289 U.S. 516 (1933). And long ago this court remarked that our system of separation of powers requires clear lines separating the branches of government. Kilbourn v. Thompson, 103 U.S. 168 (1881). See also National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Marshall v. Gorden, 243 U.S. 521 (1917)(contempt powers of Congress); Sinking Fund Cases, 99 U.S. 700 (1879).

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse

the judgment entered herein by the U.S. Court of Appeals for the Eighth Circuit.

DATED this 7 day of August, 1981.

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APPENDIX A

PARTIAL TRANSCRIPT
OF PROCEEDINGS
on March 26, 1981

MR. HELFERS: Judge, the matters in this case are all misdemeanors, so the government intends to file an information. Mr. Brink, when he appeared before the Grand Jury, attempted to present various documents concerning his position. I don't think he was allowed to present those to the Grand Jury at that time. Is that correct?

MR. BRINK: That's correct.

MR. HELFERS: And subsequently he has mailed those documents to the Grand Jury foreman and he has received those, so the only matter before the Grand Jury, for the government, would be the handwriting matters.

THE COURT: In other words, it will not be an indictment? If you proceed, it will be a misdemeanor?

MR. HELFERS: Yes, Your Honor, that's

correct.

THE COURT: And the United Sttaes Attorney will sign that and then he'll have an opportunity to present motions and so forth before the Court. Is that right?

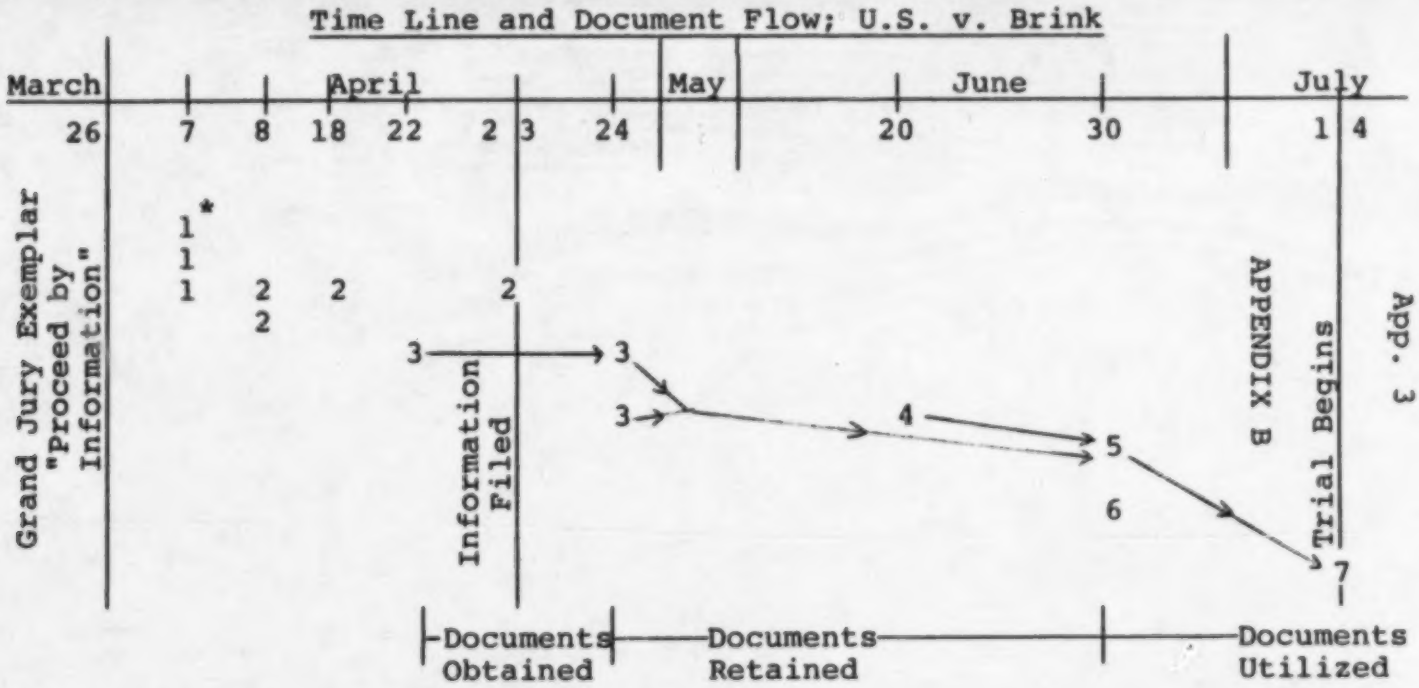
MR. HELFERS: Yes, Your Honor.

THE COURT: Okay.

MR. HELFERS: Judge, I have an application and an order for the court.

THE COURT: All right. Fine.

Very well, the Court will make this order ordering him to do the things that the Grand Jury has requested.



*Explanation of numbers are contained on the following page.

(Not to scale; year is 1980)

1. Four (4) Grand Jury Subpoenas issued. (After decision to proceed by information.)

2. Four (4) Grand Jury Subpoenas served. (One served on day information filed.)

3. Documents subject to Grand Jury Supboenas delivered to I.R.S. (Some delivered after information filed.)

4. Defendant ordered to submit to handwriting exemplar.

5. Original documents secured by Grand Jury Subpoena, plus exemplar, delivered to handwriting expert.

6. Trial Subpoenas issued. (Dates unknown to defendant.)

7. Government introduced original documents secured by Grand Jury Subpoenas; handwriting expert testified. (Fruits of Grand Jury Subpoenas.)

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

this 7 day of August, 1981.

John Foreman

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Appendix

81-305

No.

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Filed August 13, 1981

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 80-1754

UNITED STATES OF AMERICA,	*	
	*	Appeal from the
	*	United States
Appellee,	*	District Court
	*	for the Eastern
vs.	*	District of
	*	Missouri
KEITH A. BRINK,	*	
	*	
Appellant.	*	

Submitted: November 17, 1980

Filed: May 12, 1981

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HARRIS, District Judge.*

HENLEY, Circuit Judge.

Appellant, Keith A. Brink, was convicted on two counts of willful failure to file a tax return, in violation of I.R.C. § 7203, and two counts of willfully supplying a false and fraudulent withholding exemption certificate, in violation of I.R.C. § 7205.[1] On appeal Brink contends that the district court erred in denying his motions for

dismissal on grounds of (1) abuse of the grand jury process and (2) selective prosecution. We affirm the judgment of the district court.

Appellant's principal contention is that the prosecution abused the grand jury process by obtaining evidence through grand jury subpoenas and retaining and using such evidence. After IRS administrative procedures failed to persuade appellant to file the necessary returns for taxable years 1976 and 1977, a federal grand jury began an investigation. Brink was subpoenaed to testify before the grand jury on March 12, 1980. He testified but refused to supply handwriting exemplars. At that hearing the Assistant United States Attorney (AUSA), aware that the limitations period on two of the counts was about to expire, informed the district court that it was possible that charges

would be filed by information.

On April 7, 1980 four grand jury subpoenas were issued, upon request of the AUSA, to former employers of Brink. The subpoenas requested production of documents relating to Brink's employment, i.e., a contract and several W-4 forms.[3] The subpoenas were served between April 8 and April 23. The original documents obtained were turned over to IRS Special Agent Howard Brooks who was assisting with the investigation of Brink.

Believing that a grand jury indictment would not be timely returned, the AUSA filed a four-count information on April 23, 1980. Brink was arraigned and trial was set for July 14, 1980. On June 20, 1980 the United States moved for disclosure of the handwriting exemplars pursuant to Fed. R. Crim. P. 6(e), or in the alternative for new exemplars. The district court

ordered Brink to submit new exemplars. On June 30, 1980 the United States delivered the exemplars to an IRS handwriting expert in Chicago. The W-4 forms obtained by grand jury subpoenas and other documents were forwarded with the exemplars for handwriting analysis. After the expert prepared his report, the documents were returned to the employers.

We first consider appellant's attack on the original issuance of the grand jury subpoenas. Brink would interpret the AUSA's comment on March 26 as evidence that a decision to abort the grand jury investigation had already been made. He contends that the subsequent issuance of grand jury subpoenas was improper.

Appellant's claim is without merit. Consistent with his knowledge that the limitations period was about to expire, the AUSA notified the district court that

the United States might proceed by information. The AUSA continued to assist the grand jury in obtaining relevant documents, until it became obvious that a grand jury indictment could not be timely filed. There is no evidence in the record to support the contention that the AUSA or Agent Brooks acted in bad faith in requesting the subpoenas, see United States v. Aronson, 319 F.2d 48, 52 (2d Cir.), cert. denied, 375 U.S. 920 (1963), nor is there any basis to conclude that the prosecutor used the subpoenas to conduct a personal inquisition, see In re Melvin, 546 F.2d 1, 4-5 (1st Cir. 1976); Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954). We find the issuance of the subpoenas was not improper.

Appellant contends that even if the documents were validly obtained by grand jury subpoenas, their retention and use by

the government was impermissible. First, Brink argues that he was prejudiced by the introduction at trial of original documents improperly retained by the government. Our independent review of the entire record, including the trial exhibits, reveals, however, that the documents used at trial were obtained by valid trial subpoenas issued pursuant to Fed. R. Crim. P. 17(c), and not by grand jury subpoenas.

Second, Brink claims that the district court erred in admitting the report of the handwriting expert prepared in part from documents obtained by grand jury subpoenas. The government could have moved pursuant to Rule 6(e) for disclosure of the documents to the IRS for handwriting analysis. See United States v. Thomas, 593 F.2d 615, 623 (5th Cir.), modified on other grounds on rehearing, 604 F.2d 450 (5th Cir. 1979), cert. denied, 100 S.Ct. 120 (1981).

See also United States v. Universal Mfg. Co., 525 F.2d 808, 811-13 (8th Cir. 1975). Alternatively, the government could have obtained the documents for trial preparation by motion under Rule 17(c). Nevertheless, by inadvertence or mistake, the documents were retained and disclosed without express authorization from the district court.

Assuming, arguendo, that Brink has standing to contest use of the documents,[4] we conclude that the error, if any, in admitting the expert's report was harmless beyond a reasonable doubt. Other evidence submitted to the jury provided an adequate basis for finding that appellant signed the allegedly false W-4 forms. A representative of Global Graphics, one of Brink's former employers, testified that she was familiar with Brink's signature and that the 1976 W-4 shown to her was signed by Brink.

A number of letters concededly written and signed by Brink were also in evidence. All these documents were properly authenticated under Fed. R. Evid. 901, and were available for comparison with the 1977 W-4 forms in question. See United States v. Mangan, 575 F.2d 32, 41-42 (2d Cir.), cert. denied, 439 U.S. 931 (1978). In addition, we note that although Brink testified about the W-4 forms he never denied having signed and filed them.

Based upon the untainted evidence the jury was free to draw its own conclusion about the authenticity of the signatures on the withholding certificates. 28 U.S.C. § 1731.[5] See United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 192-93 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); Miller v. United States, 410 F.2d 1290, 1296 (8th Cir.), cert. denied, 396 U.S. 830 (1969); Strauss v. United

States, 311 F.2d 926, 932 (5th Cir.), cert. denied, 373 U.S. 910 (1963). See also Short v. United States, 221 F. 248, 249-50 (8th Cir. 1915). The jury's conclusion that appellant signed his name to the W-4 forms is also supported by the statutory presumption of the genuineness of signatures on tax documents. I.R.C. § 6064. See United States v. Ponder, 444 F.2d 816, 822 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); United States v. Cashio, 420 F.2d 1132, 1135 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970).

Although we do not condone the prosecutor's failure to obtain court authorization to retain or disclose grand jury documents, in the present case there was no prejudicial error. The record contains admissible evidence more than sufficient to support the jury's conclusion that Brink signed the false withholding certificates.

Brink also claims that the district court erred in denying his motion to dismiss for selective prosecution. To establish a prima facie case of selective prosecution appellant must establish: (1) discriminatory selection for prosecution based on (2) an impermissible ground such as race, religion, or exercise of first amendment rights. United States v. Larson, 612 F.2d 1301, 1304-05 (8th Cir.) cert. denied, 446 U.S. 936 (1980); United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978).

Appellant contends that he was singled out for prosecution as a result of his good faith exercise of his right to free speech. In particular, Brink alleges that as a result of correspondence with the IRS he was unfairly labeled a tax protestor and prosecuted, while others who failed to pay taxes were not prose-

cuted. The record shows that Brink's claim is meritless. The IRS investigation had its origin in Brink's failure to respond to two computer-generated letters regarding his Individual Retirement Account. Because he refused to cooperate at the early stages of the inquiry, the matter was referred to a special IRS investigator. Brink continued to refuse to answer routine inquiries. The investigation eventually revealed that Brink had failed to file tax returns and had supplied false withholding exemption certificates. Brink's prosecution was based on these violations of the tax laws and was not the result of his letter writing campaign initiated after the IRS investigation had begun.[6] Appellant has failed to establish either element of a prima facie case of selective prosecution and his claim must fail.[7]

After a careful review of the briefs and record, we find appellant's claims to be without merit.[8] The judgment is affirmed.

---

*The Honorable Oren Harris, United States Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

[1]Brink was sentenced to an aggregate term of imprisonment of two years, and a total fine of $10,000.00 was imposed.

[2]The Honorable James H. Meredith, United States Senior District Judge, Eastern District of Missouri.

[3]We will refer to withholding allowance certificates (forms W-4) and exemption from withholding certificates (forms W-4E) collectively as "W-4 forms."

[4]The United States argued before the district court and urges here that appellant lacks standing to contest the use of documents owned and supplied by third parties. We have doubt that appellant has standing to contend that his fourth amendment rights were violated. United States v. Miller, 425 U.S. 435, 440-46 (1976). Similarly, Brink cannot contend that his fifth amendment privilege against self-incrimination was infringed. Fisher v. United States, 425 U.S. 391, 400-01 (1976). Appellant may have standing, however, to assert that his right to due process was violated or that the grand jury process was abused. See In re Mangus, Mabee & Reynard, Inc.,

311 F.2d 12, 18-19 (2d Cir. 1962) (Lumbard, J., concurring), cert. denied, 373 U.S. 902 (1963).

[5]The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

28 U.S.C. § 1731.

[6]Brink wrote scores of letters to the IRS and other government officials asking questions about the application of the tax laws, e.g., "Are wages income?"

[7]Because appellant has failed to allege facts sufficient to establish a prima facie case of selective prosecution, his claim that the district court erred in denying his motions for discovery of government documents must also fail. See United States v. Catlett, 584 F.2d 864, 866-68 (8th Cir. 1978).

[8]Appellant also claims that there was insufficient evidence for the jury to find that he acted willfully. We note that evidence of Brink's prior filing and tax paying history and IRS attempts to explain the legal requirements to him are sufficient to sustain the jury's finding that he was aware of the obligations imposed by the tax laws and intentionally did not comply with them. See United States v. Francisco, 614 F.2d 617, 618 (8th Cir.), cert. denied, 446 U.S. 922 (1980).

Brink raises other allegations of error,

including alleged defects in jury instructions, admission of prejudicial evidence, and rulings on objections to testimony. These claims are meritless and we do not discuss them further.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1754 September Term, 1980

UNITED STATES OF AMERICA,)
)
Appellee,)
)
vs.)
)
KEITH A. BRINK,)
)
Appellant.)

Appeal from the United States District Court for the Eastern District of Missouri.

This cause was heard on a designated record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

After consideration it is now ordered and adjudged that the judgment & commitment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

May 12, 1981

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1754 September Term, 1980

UNITED STATES OF AMERICA,	)	
	)	Appeal from the United
	)	States District Court
Appellee,	)	for the Eastern District
	)	of Missouri
vs.	)	
	)	
KEITH A. BRINK,	)	
	)	
Appellant.	)	

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 8, 1981

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1754 September Term, 1980

UNITED STATES OF AMERICA,	)	
	)	Appeal from the United States District Court for the Eastern District of Missouri.
Appellee,	)	
	)	
vs.	)	
	)	
KEITH A. BRINK,	)	
	)	
Appellant.	)	

Appellant's motion to correct the record or, in the alternative, motion for evidentiary hearing, has been carefully considered by the Court and is overruled.

June 16, 1981

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1754 September Term, 1980

UNITED STATES OF AMERICA,	)	
	)	Appeal from the United States District Court for the Eastern District of Missouri
Appellee,	)	
vs.	)	
KEITH A. BRINK,	)	
Appellant.	)	

The Court having considered appellant's motion for stay of mandate pending cert proceedings, it is now here ordered by the Court that appellant's motion be and is hereby denied.

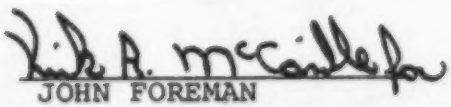
June 29, 1981

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

this 13 day of August, 1981.



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Opposition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-535

In the Supreme Court of the United States

OCTOBER TERM, 1981

KEITH BRINK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in this criminal tax case, the district court properly denied petitioner's various motions to dismiss, for an evidentiary hearing, or for suppression of evidence on the ground of an alleged abuse of the grand jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-305

KEITH BRINK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Supp. App. 5-18)[1] is reported at 648 F.2d 1140.

JURISDICTION

The judgment of the court of appeals (Supp. App. 19) was entered on May 12, 1981. The court denied a petition for rehearing with suggestion for rehearing en banc on June 8, 1981 (*id.* at 20). The petition

[1] "Supp. App." refers to the Supplemental Appendix to the petition. "Tr." refers to the trial transcript.

for a writ of certiorari was filed on August 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was charged by an information in the United States District Court for the Eastern District of Missouri with two misdemeanor counts of willfully failing to file an income tax return, in violation of 26 U.S.C. 7203, and two misdemeanor counts of willfully supplying a false and fraudulent withholding exemption certification to his employers, in violation of 26 U.S.C. 7205 (Tr. 524-528). After a jury trial, petitioner was convicted on all four counts and sentenced to an aggregate of two years' imprisonment and fines totaling $10,000 (*id.* at 549). The court of appeals affirmed (Supp. App. 5-18).

In 1978, the Internal Revenue Service had commenced an investigation to determine petitioner's potential criminal and civil tax liability, having discovered that he had not filed federal income tax returns for 1976 and 1977 (Tr. 327-328). During the course of that investigation, the Service obtained, through administrative summonses issued to petitioner's former employers, records relating to his income, including W-2 and W-4 Forms[2] (Tr. 338-341, 357). These records showed that petitioner had received income of more than $38,000 in 1976 and more than $42,000 in 1977 (Tr. 340, 379). However, because of petitioner's statements on the W-4 Forms, no money had been withheld from his wages (Tr. 310-311). The matter was subsequently referred to a grand jury, before which petitioner testified on March 12, 1980. Petitioner refused, however, to com-

[2] For convenience, we refer to "W-4 Forms" although a W-4E Form was also involved.

ply with an order of the grand jury to produce handwriting samples until ordered to do so on March 26, 1980, by the district court. On April 7, 1980, grand jury subpoenas were issued to petitioner's former employers, requiring production of petitioner's W-4 Forms and an employment contract, all of which had been previously obtained by the Internal Revenue Service (Supp. App. 6-8; Tr. 162-163; Court Ex. 1).

Because the Assistant United States Attorney was concerned that the statute of limitations would expire on one count if he waited for the grand jury to return an indictment,[3] he filed a four-count information against petitioner on April 23, 1980. Petitioner was arraigned and trial was set for July 14, 1980. On June 20, 1980, the government moved under Fed. R. Crim. P. 6(e) for disclosure of the handwriting samples obtained by the grand jury or, in the alternative, for new samples. The district court ordered petitioner to produce new samples. On June 30, 1980, the government delivered the new samples, together with documents previously obtained by the grand jury, to an Internal Revenue Service handwriting expert for analysis. After the expert prepared his report, the documents were returned to their owners. Subsequently, on July 7, 1980, trial subpoenas were issued under Fed. R. Crim. P. 17(c) to petitioner's former employers. Through these subpoenas, the original documents introduced at trial were obtained, including all those previously subpoenaed by the grand jury (Supp. App. 7-11).

Before trial, petitioner initially moved to dismiss, alleging that the grand jury had determined not to

---

[3] The statute of limitations on Count III, charging petitioner with supplying a false withholding form on April 28, 1977 (Tr. 526-527), would have expired on April 28, 1980. See 26 U.S.C. 6531.

return an indictment, which he contended would then make it improper to proceed by information (Tr. 7-8). On the government's representation that no indictment had been presented to the grand jury, the court denied petitioner's motion (Tr. 9-10). On the second day of the trial, petitioner renewed his motion to dismiss, alleging that there had been grand jury abuse, and moved in the alternative for an evidentiary hearing or for suppression of the evidence obtained by the grand jury subpoenas (Tr. 162-166).[4] The district court found that there was no grand jury abuse and denied petitioner's motions (Tr. 231-232).

ARGUMENT

1. Petitioner contends (Pet. 23-24) that his conviction should be set aside because of an alleged abuse of the grand jury.[5] Specifically, he argues (Pet. 9-10) that as of March 26, 1980, the Assistant United States Attorney had decided not to seek his indictment, but instead to charge him by information, and

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[4] Petitioner attempted to justify his motion to suppress, which normally must be made before trial under Rule 12(b)(3), Fed. R. Crim. P., by the claim that it was based on information he had obtained during trial as a result of a mistake by the Assistant United States Attorney (Tr. 164).

[5] It is not entirely clear what relief petitioner seeks. In his petition (Pet. 9, 12) he refers only to his alternative motions to dismiss or for an evidentiary hearing and apparently has abandoned his objection to the ruling on his motion to suppress. At all events, the district court properly denied all three motions. In addition, as the court of appeals noted (Supp. App. 11), petitioner apparently has no standing to raise objections to the use of documents owned and supplied by third parties. Cf. *United States* v. *Payner*, 447 U.S. 727 (1980).

that some of the documentary evidence introduced in the trial had been obtained through grand jury subpoenas issued after that date. Petitioner urges (Pet. 19) that issuance of grand jury subpoenas after "the point at which the Government unequivocally abandons the Grand Jury indictment for charge by information" is improper, on the apparent assumption that the sole legitimate function of a grand jury is to investigate with the intention of possibly bringing an indictment.[6]

The legal question petitioner raises, however, is simply not presented by the facts of this case. The district court, in response to petitioner's contentions, found "nothing which indicates that the government improperly used the Grand Jury process" (Tr. 231). The court of appeals agreed, noting that the Assistant United States Attorney had not decided, at the time when the grand jury subpoenas were issued, not to seek an indictment, but rather "continued to assist the grand jury in obtaining relevant documents, until it became obvious that a grand jury indictment could not be timely filed" (Supp. App. 9). Finally, the court rejected petitioner's contention as to the source of the original documents used against him at the trial, noting (Supp. App. 10):

> Our independent review of the entire record, including the trial exhibits, reveals, however, that the documents used at trial were obtained by valid trial subpoenas issued pursuant to Fed. R. Crim. P. 17(c), and not by grand jury subpoenas.

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[6] Petitioner variously characterizes this argument in terms of abuse of the grand jury (Pet. 11), prosecutorial misconduct (Pet. 15-16), and separation of powers (Pet. 21-23), but the argument is essentially the same in all respects.

Thus, the grand jury subpoenas were validly issued,[7] and, in any event, the documents used at trial had not been obtained by those subpoenas.[8]

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[7] Petitioner was charged by information for having committed misdemeanors, which need not constitutionally be charged by indictment. *Duke* v. *United States*, 301 U.S. 492 (1937); *United States* v. *Johnson*, 585 F.2d 374 (8th Cir. 1978), cert. denied, 440 U.S. 921 (1979). The grand jury, however, may indict for misdemeanors (Fed. R. Crim. P. 7(a)) and it is proper for it to inquire into the possible commission of misdemeanors as well as felonies. *Sullivan* v. *United States*, 348 U.S. 170, 173 (1954); *United States* v. *Bukowski*, 435 F.2d 1094, 1103 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971); *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 316-317 (D.D.C. 1960). Thus, even on the assumption that a grand jury subpoena issued after the government has determined not to request an indictment but to charge by information would be improper, a subpoena issued before that decision has been made would be proper.

[8] Petitioner errs in contending (Pet. 17, 20) that it was improper to subpoena him to appear at a time when the grand jury was not in session. When petitioner was subpoenaed to appear on March 12, 1980, he was told that the grand jury was not in session and served with an order to appear before the district court that afternoon for grand jury proceedings. Petitioner appeared before the district court, but the court continued proceedings until March 26, 1980. Subsequently, petitioner appeared before the district court, and, after a brief hearing, the district court directed petitioner to comply with the grand jury's order to supply handwriting exemplars (Mar. 26, 1980 Tr. 3-4, 6). Because the purpose of that hearing was only to determine whether petitioner should be ordered to produce handwriting exemplars, there was no reason to hold it on a day on which the grand jury was in session. Moreover, since the subpoenaed documents would have to be subjected to screening and analysis prior to their production to the grand jury (*see Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098, 1105-1107 (E.D. Pa. 1976)), there would be no point in limiting their production to days on which the grand jury is in fact sitting.

Although the handwriting report introduced at trial was in part based on third-party documents obtained by the grand jury subpoenas, its use at trial also does not present the legal issue petitioner seeks to raise. When the grand jury subpoenas for those documents were issued, no decision had been made to charge by information instead of indictment. Thus, there is no question as to the propriety of those subpoenas, and the fact that the documents, properly obtained by those subpoenas, were retained by the government[9] and transmitted in preparation for trial to the Internal Revenue Service expert was entirely proper.[10] Cf. *United States* v. *Garcia*, 420 F.2d 309, 311 (2d Cir. 1970).

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[9] There is no suggestion that the subpoenaed documents were retained contrary to the wishes of their owners.

[10] The court of appeals assumed (Supp. App. 10, 13) that a Rule 6(e) order was technically required to disclose those documents to the Internal Revenue Service handwriting expert. But that is not the case. The purpose of Rule 6(e) is to preserve the secrecy of what takes place in the grand jury room "in order to preserve the freedom and integrity of the deliberative process." *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980), cert. denied, 449 U.S. 1081 (1981). That rule by its terms restricts disclosure *only* of "matters occurring before the grand jury." Documents subpoenaed by a grand jury or in its possession, but which are sought for their own "intrinsic value in the furtherance of a lawful investigation," are not "matters occurring before the grand jury," and their disclosure is not restricted by Rule 6(e), at least where such disclosure would not tend to reveal what happened in the grand jury room. *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 & n.37 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980) (collecting cases); *In re Grand Jury Investigation*, *supra*, 630 F.2d at 1000-1001. But see *In re Special February, 1975 and Special April 1, 1977 Grand Juries (Baggot)*, No. 80-1999 (7th Cir. June 25, 1981), petition for rehearing en banc filed Aug. 10, 1981. It is

2. Petitioner contends (Pet. 6) that "the Court of Appeals for the Eighth Circuit chose to seriously misread the facts of record," and he sets out (Pet. 6-11) his version of those facts, which was rejected by the court below.[11] These factual controversies, however, do not warrant further review by this Court.

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apparent that the documents involved here—petitioner's withholding forms and an employment contract—are not "matters occurring before the grand jury," nor could their disclosure in any way possibly impinge on the grand jury's secrecy in view of the fact that the government had previously obtained copies of those documents. Rule 6(e) thus has no application to those documents, and their disclosure to the Internal Revenue Service expert was entirely proper.

At all events, even on the assumption that Rule 6(e) applied to those documents, subpart (3)(A)(ii) of that Rule authorized their disclosure without a court order, since the Internal Revenue Service expert was a government employee assisting a government attorney perform his duty of enforcing federal criminal law. See S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-8 (1977). Finally, assuming that a Rule 6(e) order had been required, the court correctly held (Supp. App. 11-13) that the failure to obtain such an order was harmless error, since there was sufficient other evidence to establish that petitioner had signed the W-4 Forms.

[11] Petitioner quotes (Pet. 10-11, 17) from a colloquy during oral argument before the court of appeals in which Chief Judge Lay allegedly stated, and the attorney representing the government purportedly agreed, that when the Assistant United States Attorney requested the handwriting samples he had decided not to pursue an indictment. It is our understanding, based upon discussions with the Assistant United States Attorney who argued the case before the court of appeals, that these statements are taken out of context (an official transcript of the tape does not exist), and that the discussion was in fact hypothetical.

At all events, even if petitioner's version of the facts were correct, the decision affirming his conviction is nevertheless sound. It is well settled that an information valid on its face will not be dismissed even if based on improperly obtained evidence.[12] *Costello* v. *United States*, 350 U.S. 359, 363 (1956). See also *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974).

Moreover, the district court properly denied petitioner's suppression motion. This case originated as an Internal Revenue Service investigation of petitioner, in the course of which the Service obtained various documents by issuing summonses to petitioner's former employers. Subsequently, the case was brought before the grand jury, which issued subpoenas for a few documents, all of which the government had previously properly obtained by Internal Revenue Service summonses. Since the government thus had prior independent knowledge of those documents and issued valid trial subpoenas for their production, the documents may not be suppressed even if petitioner were correct in his assertion that the government had also acquired copies of those documents by improper means. See, *e.g.*, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920); *United States* v. *Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 524 (E.D.N.Y. 1974).

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[12] This is true *a fortiori* where the government had prior independent knowledge of the subpoenaed documents on which the information was based.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE, 1981 358453 690